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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

Docket No. 110202088-2252-02

RIN 0648-BA34

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Bottlenose Dolphin Take Reduction Plan

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: The National Marine Fisheries Service (NMFS) issues this final rule amending the Bottlenose Dolphin Take Reduction Plan (BDTRP) and its implementing regulations by permanently continuing nighttime fishing restrictions of medium mesh gillnets operating in North Carolina coastal state waters from November 1 through April 30. Members of the Bottlenose Dolphin Take Reduction Team (Team) recommended these regulations be continued permanently, without modification, to ensure that BDTRP goals are met through continued conservation of strategic bottlenose dolphin stocks in North Carolina, which have historically high serious injury and mortality rates associated with medium mesh gillnets. NMFS also amends the BDTRP with updates, including updates recommended by the Team for non-regulatory conservation measures.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The proposed rule, BDTRP, 2008 BDTRP amendment, Team meeting summaries with consensus recommendations, and other background documents are available at the Take Reduction Team web site: <http://www.nmfs.noaa.gov/pr/interactions/trt/bdtrp.htm>, or by submitting a request to Stacey Horstman (see FOR FURTHER INFORMATION CONTACT).

FOR FURTHER INFORMATION CONTACT: Stacey Horstman, NMFS Southeast Region, Stacey.Horstman@noaa.gov, 727-824-5312; or Kristy Long, NMFS Office of Protected Resources, Kristy.Long@noaa.gov, 301-427-8402.

SUPPLEMENTARY INFORMATION:

Background

In accordance with section 118(f)(7)(F) of the Marine Mammal Protection Act (MMPA), this final rule implements an amendment to the BDTRP (71 FR 24776). The BDTRP was originally published on April 26, 2006, and amended on December 19, 2008 (73 FR 77531). Details regarding the development and justification of this final rule were provided in the preamble of the proposed rule (77 FR 21946; April 12, 2012) and are not repeated here.

Nighttime Medium Mesh Gillnet Fishing Restrictions in North Carolina

This final rule removes the sunset date to permanently continue, without modification, nighttime medium mesh fishing restrictions in North Carolina coastal state waters. Specifically, prohibitions of nighttime medium mesh (greater than 5-inch (12.7 cm) to less than 7-inch (17.8 cm)) gillnets in North Carolina coastal state waters from November 1 through April 30 will continue annually.

Comments on the Proposed Rule and Responses

NMFS received four comment letters on the proposed rule via mail, fax, or www.regulations.gov. Comments were received from The Humane Society of the United States and the Whale and Dolphin Conservation Society, the Marine Mammal Commission, the United States Fish and Wildlife Service, and one citizen. The comments are summarized below under regulatory or non-regulatory changes to the BDTRP. NMFS' response follows each comment.

Comments on Regulatory Changes to the BDTRP

Comment 1: Three commenters expressed support for permanently adopting the nighttime seasonal medium mesh gillnet restrictions in North Carolina coastal state waters and recommended NMFS adopt these measures as proposed.

Response: NMFS appreciates the commenters' support and is finalizing these measures as proposed.

Comment 2: One commenter said nighttime fishing should not be allowed anytime in the entire area.

Response: NMFS believes this is more restrictive than currently necessary for bottlenose dolphin conservation efforts. In North Carolina, there are currently no observed serious injuries or mortalities of bottlenose dolphins in gillnets with long soak durations outside of the currently regulated November 1 through April 30 timeframe.

Comment 3: One commenter said NMFS should ban gillnet fishing in the entire area.

Response: NMFS previously considered this option in the final Environmental Assessment implementing the BDTRP. Although this would provide additional conservation benefits to bottlenose dolphins in North Carolina, it would be at great expense to the fisheries and fishing community. It is also not a consensus recommendation by the Team. NMFS plans to reconvene the Team in 2013 to evaluate the need for possible additional conservation

measures for fisheries interacting with strategic stocks of bottlenose dolphins in North Carolina. See also comment 6 and response.

Comments on Non-regulatory Changes to the BDTRP and Updates

Comment 4: Two commenters expressed support for updating the BDTRP with the non-regulatory consensus recommendations made by the Team and discussed in the proposed rule. Specifically, continuing research to better understand bottlenose dolphin stock structure and determine if/how fishing gear modifications may reduce serious injury and mortality of bottlenose dolphins.

Response: NMFS agrees and is updating the BDTRP as proposed. NMFS will continue stock structure and gear research efforts, as feasible.

Comment 5: One commenter expressed concern that observer coverage is not robust enough to determine patterns of mortality for fisheries known to interact with bottlenose dolphins. NMFS therefore needs to allocate observer coverage effort to ensure more accurate and precise estimates of mortality for bay, sound, and estuary stocks of bottlenose dolphins.

Response: NMFS agrees augmented and expanded observer coverage would help achieve representative coverage and improve precision and accuracy of mortality estimates. The Team has repeatedly provided consensus recommendations to NMFS on the importance of more and broader observer coverage in various fisheries and areas in North Carolina. NMFS has also made multiple recent efforts to increase observer coverage in North Carolina, including: (1) implementation of a North Carolina Alternative Platform Program from 2006-2009 to observe vessels too small to safely carry onboard observers; (2) a “pulsed” observer effort in fall 2008 to augment monitoring of bottlenose dolphin serious injuries and mortalities in times and areas with known fishery interactions; (3) increased federal observer coverage in inshore and nearshore

coastal state waters in 2006/2007, 2010/2011, and 2011/2012; (4) coordination between NMFS' Northeast and Southeast Observer Programs to facilitate combined data use; and (5) continued coordination with North Carolina on federal and state observer data collection and transferability.

Comment 6: One commenter suggested NMFS reconvene the Team to evaluate if additional measures are necessary to ensure fishery-related serious injury and mortality is not exceeding Potential Biological Removal (PBR) for affected bottlenose dolphin stocks.

Response: NMFS plans to reconvene the Team in 2013 to evaluate the effectiveness of the BDTRP and determine if additional conservation measures are necessary to meet MMPA mandated goals, including assurance that PBR levels are not exceeded.

Changes from the Proposed Rule

NMFS is making one minor change from the proposed rule to this final rule. In the proposed rule, NMFS corrected the boundary for the North Carolina/South Carolina border as currently described in two BDTRP definitions. NMFS proposed to modify the border latitude from 33°52'N. to the latitude corresponding with 33°51'07.9"N. as described by "Off South Carolina" in 50 CFR 622.2. Specifically, in the definitions of Southern North Carolina state waters and South Carolina, Georgia, and Florida waters, NMFS changed the latitude to 33°51'07.9"N. and referred to the "Off South Carolina" definition. In this final rule, NMFS maintains the corrected latitude but removes the references to "Off South Carolina" in both definitions and replaces it with relevant text. Removing the reference to "Off South Carolina" reduces potential confusion over which part of the definition is being referenced and eliminates the need for readers to refer to a separate regulatory section.

Classification

This final rule was determined to be not significant under Executive Order 12866.

NMFS determined this action is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program of North Carolina. This determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act on December 22, 2011. North Carolina concurred with the consistency determination in a letter dated January 23, 2012.

This action contains policies with federalism implications that were sufficient to warrant preparation of a federalism summary impact statement under Executive Order 13132 and a federalism consultation with officials in the state of North Carolina. Accordingly, the Assistant Secretary for Legislative and Intergovernmental Affairs provided notice of the proposed action to the appropriate officials in North Carolina. North Carolina did not respond.

NMFS determined this action is categorically excluded from the requirement to prepare an Environmental Assessment (EA) in accordance with sections 5.05b and 6.03c.3(i) of NOAA Administrative Order (NAO) 216-6 for implementing the National Environmental Policy Act. Specifically, this action permanently continues, without modification, a regulation that would not substantially change the regulation or have a significant impact on the environment. NMFS prepared an EA on the final rule (71 FR 24776, April 19, 2006) to implement the BDTRP, which included an analysis of the action without time constraints. The EA analyzed all regulations in the final BDTRP of which the regulations addressed in this rule were a component. The EA resulted in a finding of no significant impact. In accordance with section 5.05b of NAO 216-6, the regulations finalized here were determined to not likely result in significant impacts as defined in 40 CFR 1508.27. This action does not trigger the exceptions to categorical exclusions

listed in NAO 216-6, Section 5.05c. A categorical exclusion memorandum to the file was prepared.

This final rule does not contain collection-of-information requirements subject to the Paperwork Reduction Act.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination was published in the proposed rule and is not repeated here. No comments were received regarding the certification. As a result, a final regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Part 229

Administrative practice and procedure, Confidential business information, Fisheries, Marine mammals, reporting and recordkeeping requirements.

Dated: June 23, 2012.

Alan D. Risenhoover,
Director, Office of Sustainable Fisheries,
performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 229 is amended as follows:

PART 229 – AUTHORIZATION FOR COMMERCIAL FISHERIES UNDER THE MARINE
MAMMAL PROTECTION ACT OF 1972

1. The authority citation for part 229 continues to read as follows:

Authority: 16 U.S.C. 1361 et seq.; 50 CFR 229.32(f) also issued under 16 U.S.C. 1531 et seq.

2. In § 229.35 paragraph (a), the definitions of South Carolina, Georgia, and Florida waters and Southern North Carolina State waters in paragraph (b), and paragraphs (d)(1)(i), (d)(2)(i), (d)(4)(ii), and (d)(5)(i) are revised to read as follows:

§ 229.35 Bottlenose Dolphin Take Reduction Plan.

(a) Purpose and scope. The purpose of this section is to implement the Bottlenose Dolphin Take Reduction Plan (BDTRP) to reduce incidental mortality and serious injury of stocks of bottlenose dolphins within the Western North Atlantic coastal morphotype in specific Category I and II commercial fisheries from New Jersey through Florida. Specific Category I and II commercial fisheries within the scope of the BDTRP are indentified and updated in the annual List of Fisheries. Gear restricted by this section includes small, medium, and large mesh gillnets. The geographic scope of the BDTRP is all tidal and marine waters within 6.5 nautical miles (12 km) of shore from the New York-New Jersey border southward to Cape Hatteras, North Carolina, and within 14.6 nautical miles (27 km) of shore from Cape Hatteras, southward to, and including the east coast of Florida down to the fishery management council demarcation line between the Atlantic Ocean and the Gulf of Mexico (as described in §600.105 of this title).

(b) * * *

South Carolina, Georgia, and Florida waters means the area consisting of all marine and tidal waters, within 14.6 nautical miles (27 km) of shore, bounded on the north by a line extending in a direction of 135°34'55" from true north from the North Carolina/South Carolina border at 33°51'07.9"N. and 78°32'32.6" W., and on the south by the fishery management

council demarcation line between the Atlantic Ocean and the Gulf of Mexico (as described in § 600.105 of this title).

Southern North Carolina State waters means the area consisting of all marine and tidal waters, within 3 nautical miles (5.56 km) of shore, bounded on the north by 34°35.4'N. (Cape Lookout, North Carolina), and on the south by a line extending in a direction of 135°34'55" from true north from the North Carolina/South Carolina border at 33°51'07.9"N. and 78°32'32.6" W.

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(d) * * *

(1) * * *

(i) Medium and large mesh gillnets. From June 1 through October 31, in New Jersey, Delaware, and Maryland state waters, no person may fish with any medium or large mesh anchored gillnet gear at night unless such person remains within 0.5 nautical mile (0.93 km) of the closest portion of each gillnet and removes all such gear from the water and stows it on board the vessel before the vessel returns to port.

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(2) * * *

(i) Medium and large mesh gillnets. From June 1 through October 31, in Southern Virginia State waters and Northern Virginia State waters, no person may fish with any medium or large mesh anchored gillnet gear at night unless such person remains within 0.5 nautical mile (0.93 km) of the closest portion of each gillnet and removes all such gear from the water and stows it on board the vessel before the vessel returns to port.

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(4) * * *

(ii) Medium mesh gillnets. From November 1 through April 30 of the following year, in Northern North Carolina State waters, no person may fish with any medium mesh gillnet at night.

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(5) * * *

(i) Medium mesh gillnets. From November 1 through April 30 of the following year, in Southern North Carolina State waters, no person may fish with any medium mesh gillnet at night.

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[FR Doc. 2012-18667 Filed 07/30/2012 at 8:45 am; Publication Date: 07/31/2012]